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IN THE

Supreme Court of the United States

October Term 1966.

No. 665.

WILLIAM ROBERT KLEIN, *Petitioner,*

v.

SOLOMON A. KLEIN, *Respondent.*

ON A PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

PETITION FOR REHEARING.

WILLIAM ROBERT KLEIN,
Petitioner pro se,
132 West 43rd Street,
New York, N. Y.

December 26, 1966.

THE REPORTER COMPANY, INC., New York, N. Y. 10007—RE 2-6978—1966
(6574)

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ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

PETITION FOR REHEARING.

Petitioner respectfully moves this Court for an Order (1) vacating its denial of the Petition for Writ of Certiorari, entered on December 5, 1966 and (2) granting the Petition. As grounds herefor, petitioner avers:

Petitioner is aware that this Court, in its acceptance or rejection of a cause for certiorari, exercises a prerogative of high discretion; and that numerically, acceptances are relatively few, and that rehearings are granted even more rarely. Petitioner seeks rehearing upon new circumstances, perhaps equally rare, and for most cogent reasons, of basic constitutional impact.

Uniquely, neither the petitioner's claims of constitutional and legal invasion, nor the grave successive "Statements of Fact" of his briefs in the court below and here, stand at all challenged.

However, a latest disclosure, of record-tampering, appearing within the halls of this high Tribunal, and to thus induce its rejecting action, must be viewed together with this prosecution's most rare achievement, of a "summary," "short-shrift" disbarment, lacking a 230-year precedent in New York's legal annals.

The decidedly comparable events of those colonial days in 1735 drew Mr. Justice Black's ire, and these quotes; when, as here, the attorney was unceremoniously stripped of his license, for exercise of his *freedom,* and *obligation,* to challenge judicial administration. Chief Judge Warren and Justice Douglas joined that vigorous opinion, in a recent case, probing the within same, Kings County's secret inquisition, "Judicial Inquiry on Professional Conduct," and its potential "dangers" to professional "independence" and human liberties (*Cohen v. Hurley,* 366 U. S. 117, 6 L. Ed. [2] 156). At page 171:

> "Indeed those Courts did sometimes make 'short-shrift' of lawyers whose greatest crime was to defend unpopular causes."

At page 173, here specially pertinent, opposing the majority opinion as carrying

> "the plain implication that a lawyer is not to have the protection of the First Amendment * * * whenever his exercise of those freedoms might interfere with his duty to 'cooperate' with a judge. On the contrary, I find in that opinion, a willingness to give overriding effect to the lawyer's duty of 'cooperation,' even to the destruction of constitutional safeguards."

But that majority opinion *also* cautioned for safeguards, against a secret Body, which were, so flagrantly, ignored, flouted and violated by this prosecution.

Why, then, was this petitioner's cause denied this Bench's initial interest, and the protection of this national tribunal, in the presence, uncontested, of the four "Reasons for Granting Writ" set out at pages 3-4 of the petition,—certainly, if true, most cogent here? And where a so rare, retaliatory, ill-disguised, *judicial* prosecution, and so obviously, requires a non-local evaluation?

This petition respectfully proposes herein to shed some light for an answer to an apparent incongruity.

Petitioner's discovery on December 8, 1966, in the file room of this court, three days after its decision.

It is not disputed that the process of certification of the original records of the disciplining Court,—some strangely coming into being, from the prosecutor's personal office for the first time,—was largely managed by him and under his control, being an arm of the certifying Court (see Certified motion papers, brought under Rule II of the Court of Appeals, unopposed in that court; also certified Appellant's Reply Brief; also petitioner's letters to Clerk of this Court, protesting that illicit management of the records below, between August and October, 1966; and Appendix D of Petition).

It is likewise not disputed that a most material, concealing alteration had been made on the *first* order of the Appellate Division, entered in the disciplinary proceeding, dated January 13, 1965; but that alteration was not made, nor its discovery made, until after this respondent heard this petitioner, as appellant before Court of

Appeals, Judge Fuld, at his chambers, on preliminary motion for stay, cite that order, in its *original* condition, as showing that "Hon. A. David Benjamin, Justice" was "present" and participated in decision and order. This prosecutor, before Judge Fuld, at once vehemently denied the truth thereof. For, it was vital in showing Court bias, and absence of due process, in that the very Trial Judge, was now a member on the controlling Appellate Bench; he had "commanded" the prosecution, and its abrupt transfer, from the Bar Association of New York County,—there already pending as *first* directed by him—to his own Kings County's local secret Body. Investigation of that Judge's conduct already was, also, under the assigned jurisdiction of the same Appellate Division (App. C, p. 41, Pet. for Cert.). Such prosecution would naturally effect an immunity for the Judge.

Now, invading the portals of this high Tribunal, comes stark evidence of a new, covering alteration, on the companion document, the "Slip Memorandum" of like date, also originally recording the same five-judge participation. That paper was apparently overlooked in the first alteration process, but so seen by this petitioner in the files in early 1965-6. Only now is it discovered, as also altered, to conform. It is clear that neither the disciplining Court nor this respondent was aware that carbon copies of each of the altered documents, in their original forms, had already been furnished to petitioner long before, *before alteration.*

The second alteration was made, it will be seen, to look more casual, in eliminating the Trial Judge's name from list of judicial participants; so designed, to discredit the petitioner, and his first claim of alteration, and his entire position before this Court,—a dastardly endeavor, certainly.

However, this is only a continuation of a pattern. The records before this Court, establish, beyond possible dispute, that at each critical stage in the proceedings, *ab initio*, and in each Court, to date, this prosecution did resort to positive, individual deceptions, calculated firstly to obtain, and then to retain, the summary judgment of disbarment.

In substantiation of the foregoing is submitted:

(aa) In the secret Judicial Inquiry, respondent at outset on October 24, 1963, and in absence of Petitioner, though authenticated Complainant under the authorizing Orders, and without revealing to his Judge Baker, presiding, the purpose of that testimony, then presented, thus prepared the ultimate Charge "8c" of the Petition for discipline. Judge Baker was then ruling that *no* charges of any kind under his Orders would be entertained against the three named Complainants; and final reassurance by Judge Baker to this Petitioner was given at the close of the hearings on January 23-4, 1964. In the meantime, other additional charge evidence was so being offered, without any such disclosure to Judge Baker, and contrary to his repeated rulings of exclusion.

(a) In Original Petition, respondent sworn that Judge Baker had made a "Report," "finding" charges against this Petitioner, dating it "November 6, 1964" as "filed" thereon in the Appellate Division. As the record now, without dispute, stands, and as certified by the Clerk of the Appellate Division, there never was *any* Report of Judge Baker filed, or made on that or any other day or date. But, that non-existent 'Report' in turn also became the *recited* basis for the Disbarment Opinion and Judgment!

(b) **In Answering Brief to Court of Appeals,** respondent, boldly and falsely declared, and further implied, that this Petitioner's granted time to make preliminary motions, addressed to the original Petition, to dismiss, before making any answer of denials and defenses "had expired," without such motion having been made; and correspondingly he misquoted the statutes governing the procedure, so as to read that an answer of denials was "'commanded" thereby, and that no right to make preliminary motions in demurrer, existed. He did so by citing "Sections 402, 403" and "409" of Article 4 of the Civil Practice Law and Rules, but deftly omitted Section 404, which prescribed such motions, and in place of any Answer. This deft treatment brought its direct result in the first paragraph of the short Opinion of the Court of Appeals, avoiding all constitutional questions raised on the appeal, and thus finding the judgment "warranted."

(c) **In Affidavit Before Mr. Justice Harlan,** dated August 25, 1966, Respondent swore at page 5, to a

> "motion made on August 3, 1965, to be relieved of his default and 'that the matter be referred to an impartial referee for hearing."

Neither the disbarment judgment, nor opinion, recites or refers to any "default." No such motion was ever made, no default in answering the original petition, existed, nor was ever claimed, declared or referred to in any of the proceedings *by anyone;* and no motion based upon any fact or theory of default, was ever made. On the contrary, that statement under oath was the first one of its kind, and was hauled out *for the first time,* for Mr. Justice Harlan's attention. A public Prosecutor's oath is in-

deed impressive, and so there can be little doubt that Mr. Justice Harlan's decapitating decision, of no substantial Federal question, followed in natural wake thereof. No statement could be more calculated to throw off base, Mr. Justice Harlan's deliberations; and the Prosecutor did not inform the Justice that the seven-judge Court of Appeals Bench had unanimously denied his motion to dismiss the appeal, based on that very ground, the lack of substantial federal and state constitutional questions. That appeal, under State Constitution and laws, could not have been entertained, with ultimate "affirmance," if such lack existed.

The short bare Briefs of the Prosecution in each Court, capitalized almost exclusively, upon the victories thus earlier obtained; particularly, here, the one from Mr. Justice Harlan, with reinforcement by documentary alterations, using them in place of constitutional authorities.

Can the highest Tribunal in the land ignore the contempt of Court, implicit in those alterations here, do less than zealously safeguard its dignity and the constitutional principles in presence of such a compounding prosecution?

This act of contempt, in defilement of deliberations, to defeat justice, was followed closely by prosecution's attempt, by withholding the record beyond the 90-day jurisdictional period, to defeat this jurisdiction.

Mr. Justice Harlan's advance decapitating decision, denying existence of substantial federal question, followed on respondent's sworn official misstatement as to the content of the judgment record—not heretofore presented to this court in that revealing light.

This misstatement has already been factually set out under "(c)" above.

Looking back on the course taken by this certiorari application, it is difficult to assume that Mr. Justice Harlan's decision denying stay of September 2, 1966, reaffirmed so definitely on October 4, 1966, did not take its reasonable toll in operating to discourage, if not preclude, any judicial need for further, or full, attention to the coming main petition—certainly by Justice Harlan, and likely by his normally deferential colleagues; who were presented no reason then, for looking back of said decision, as now. (Actually, on request for re-hearing, thereon, this Court's Rule 50[6] was invoked for reference of the application for stay to the entire Bench.) The old and respected name, the Justice bears, synonymous with the highest historic traditions of American jurisprudence, and the due deference of his colleagues did not tend to reduce that toll. And, certainly, the Justice was justified in assuming the truth of matters of judgment record when so unreservedly stated by a public official. But the latter, in turn, fully exploited that cut-off disposition of Mr. Justice Harlan by repetitious use thereof, in his brief in opposition; so that, if a busy or penetrating reader were inclined first to reach for the opposing brief, for the nature of its opposition, from which to make basic evaluation, the induced disastrous result, of a unanimous refusal to entertain certiorari, could understandably follow.

Petitioner, requesting rehearing, is bound to ask, whether something akin thereto did happen. For in the light of Mr. Justice Harlan's sensitively opposite opinions, and those of the Court, for which he spoke, and those of the minority—sensitive, but also irate,—toward State threats, to attorneys, to membership at the state bar, and their exclusion therefrom and the need of preserving their professional independence in the practice, no one can doubt, that if squarely and not foully presented, this rare type of disbarment case should have stirred a revival of that unanimous profound concern, and amongst, at least, these four Justices: Ch. J. Warren, Black, Douglas, Brennan, JJ., in addition to Harlan, J. Reference is here had to *Cohen v. Hurley, ante; Re Anon. 6 & 7 v. Baker,* 360 U. S. 287; *Schware v. Board of Law Examiners,* 353 U. S. 232, 257; *Holt v. Virginia,* 381 U. S. 131 (concerning a $50 fine for contempt).

Only recently in contrast, Mr. Justice Harlan, granted a stay preliminarily, on principle stated, for a doubtful case; which, but for the prosecution's misplay, should have applied here, minimally; and where facts and law are not disputed, as here, it should apply *a fortiori* (*re* Kaye, an Attorney, decided May 5, 1966):

> "I cannot say that there is no reasonable likelihood that a writ will issue in the present case."

In the *Cohen* case, the Judicial Inquiry on Professional Conduct of Kings County, and Judge Baker's role, and the prescribed secrecy of its hearings in "secret inquisition," in relation to protection of attorneys and the innocent, *became the subject of certiorari, on the Court's own motion,* even after its dismissal in Court of Appeals, for lack of substance. Mr. Justice Harlan, wrote the majority Opinion; in which, reference is made also to the earlier *Re Anon. 6 & 7 v. Baker* (wherein the same in-

quiry drew the deep Constitutional interest of the unanimous Bench, as being of most substantial Federal import, although arising only on a contemptuous refusal to answer questions). The majority and minority opinions differed in both cases on the issue, not on whether full and broad protections were obligatory, but whether the inherent structure of such secret inquisitional body adequately guaranteed them. For Mr. Justice Harlan, wrote, at page 161, 6 L. Ed.(2) (holding that the operative distinction between exclusion, by admission, or disbarment, is "not of constitutional moment"):

> "Starting from the undeniably correct premise that a state may not arbitrarily refuse a person permission to practice law * * *"

Justice Harlan, in the *Anon. 6 & 7* case, speaking of the role of the same Judge Baker, as referee of the inquiry (italics added):

> "The duties of such a justice are purely investigatory and advisory, *culminating in one or more reports* to the Appellate Division, upon which future action may *then* be *based.* In the words of Mr. Justice Cardozo, then Chief Judge of the New York Court of Appeals, the proceedings at Special Term simply constitute a 'preliminary inquisition, *without adversary parties,* neither ending in any decree nor establishing any right, a quasi-administrative remedy, whereby the Court is given information that may move it to other acts thereafter.' Customarily, the proceedings are conducted at Special Term in private for reasons for which Mr. Justice Cardozo explained in the *Karlin* case as follows (248 N. Y. at 478-9):
>
> > "'The argument is pressed that in conceding to the Court a power of inquisition, we put into its hands a *weapon* by which the fair name of a lawyer, *however innocent of wrong,* is at the mercy of the tongue of ignorance or *malice.* * * *

Dangers are indeed here but not without remedy. The remedy is to make the inquisition a *secret* one in its preliminary stages.'".

Mr. Justice Harlan then added that this is

"an expression of state policy."

In the instant case, precisely those safeguards and those required steps, which Mr. Justice Harlan, and Chief Judge Cardozo singled out, as prescribed for protection of the innocent were ABSENT. From the start, the inquisition used the very secrecy, *against this petitioner;* it *was* an adversary proceeding, *against* him and his clients, alone. Its true objectives, of counter-prosecution of the complainants (whose charges were the *subject* of the orders [October 9, 30, 1963]), were secretly pursued by his own runaway aide (this respondent) from the outset; and finally, for reasons now only too obvious, *Judge Baker never made or filed any report, nor any section of the three required sections* (Estab. Order December 17, 1962, Appendix Pet. for Cert.), namely, hearing transcript, findings and recommendations.

The 1200-page transcript, certified nonetheless to this Court, bears neither the imprimatur nor the signature of Judge Baker, and is a carbon copy, which came to the disciplining Court Clerk's hands, on *April 11, 1966,* from this respondent's own office, and not on November 6, 1964, as the original petition alleges. The Clerk's stamp, thereon, and the Clerk's communication, in the record, of April 21, 1966, to this petitioner, both certify to this state of facts. Judge Baker, on closing of the hearings had announced that he would make report then in January, 1964; with oral recognition that the hearings had been frustrated by the mysterious absence of the stenographic records of the Trial Court in the cases.

The short *ex parte* hearings recently held by the Referee, being also a State Supreme Court Justice; just transcribed, further reveal both the bad faith of the originally conceived counter-prosecution and constitutional futility of post-judgment hearings.

The prosecution has now presented its "case"; hearings were had and closed in the absence of this petitioner (p. 3, Pet. Reply Brief).

The original 1200-page transcript has now shrunken to less than 50 pages of testimony, by five brief witnesses, each perhaps 10 minutes, of actual relevancy to the now shrunken five remaining "charges." Two more have now been specifically abandoned by this prosecution.

Actually the transcript, inspected only after the last submission here, *reveals what the entire prosecution from its Judicial Inquiry beginnings has truly been:* the remaining five charges, seen through the new minutes and the prosecution's newest brief to the Referee served December 7, 1966, stand bare and virtually abandoned; documents, first used in the "inquiry," and proving favorable to this petitioner, have now been withheld, and thus suppressed, to unfairly deprive the absent defendant of their additional benefit; although, admittedly, they *were* all produced before the Court of Appeals. But that was under compulsion of this petitioner, and the Court's Rule II requirements. This was especially necessary, because the last Point of Appellant's Brief took up individually, seriatim, each of the "charges" and undertook to analyze all of the evidence, presented before the Inquiry, in that 1200-page transcript, to show its insufficiency as matter of law, as to each, and failure to make out a prima facie case, for discipline, or for any "finding" or "recommendation" by Judge Baker, to constitute a charging Report, as provided.

Now, it is clearer than ever before, that Judge Baker never made or filed *any* report, whether as specified in the disciplining Court's opinion, or as recited in the original verified petition of this prosecutor, or in the order designating him on such recited account, to "institute" the disciplinary proceeding. What the prosecutor has been doing, by himself and with personal staff, is running a holding operation; holding the line of a retaliatory judgment, boisterously referring to the respondent's "gross" and "grave" misconduct, from time to time as "found" in the "unanimous opinion of the Appellate Division," without any hearings had, and with the principal "charge" and "finding" long ago abandoned, and the others, withdrawn or vanishing.

For, his latest brief reads, and opens, as follows:

> "This disciplinary proceeding arises out of an an investigation made by the Judicial Inquiry on Professional Conduct, established by Orders of the Appellate Division, Second Judicial Department, made December 19, 1962, and October 9, 1963, pursuant to Section 90, subd. 6, of the Judiciary Law. The petition and an order directing respondent to show cause why he should not be disciplined was personally served upon the respondent in December, 1964 . . . ."

At page 6, there is this further admission:

> "By orders, of the Appellate Division, Second Judicial Department, made October 9, 1963, and October 30, 1963, the Judicial Inquiry was *directed to investigate the charges theretofore made by John R. Ursini and his wife, and by respondent William Robert Klein and to report to the Court thereon.*" (Italics added.)

But no linking mention of any "Report," made or filed at that appropriate point of recital, appears any longer, nor throughout this newest 25-page brief. Nothing new is

shown under the "charges" but a service to clients, in the one Fun Fair litigation, and of a proper and dedicated nature; and in furtherance of the administration of justice, in compliance with the Obligations of Canon No. 1 of Code of Professional Ethics, and in pursuance of statutory invitation, to make "complaints, criticisms and recommendations" (Secs. 212, 213, Jud. Law).

The minutes show that the Referee, a Supreme Court Justice, Hon. Walter R. Hart, at first insisted with the prosecutors' assistant, Lawlor, that his designation was *not* "as Referee," but to sit "as a Justice of the Supreme Court", when faced with the State Constitutional bar (Art. 6, Sec. 20), until confronted with the order of reference of September 29, 1965. The Referee acknowledged his impotence to act in judicial function, or to affect by any report of his, the "final" "irrevocable" judgment, by which he as Referee, is "totally" bound (pp. 3-4, Pet. Reply Brief).

It will be noted that the respondent's "Brief in Opposition" here, filed on November 12, 1966, and long after he had fully presented his "proofs" before this Referee, is silent on the nature of those "proofs," to justify, *post-mortem*, the "final" disbarment judgment, so transparently arbitrary, and contrived. For, in each of the now diminished documentary proofs, just offered by the prosecution, and in the very contracted testimony of its few "witnesses," there is a built-in self-cancelling evidence of any misconduct, or intent to commit any, even as only conclusorily alleged in the original petition.

Does this argue no need further for this Court's supervisory action? On the contrary, even if the Referee's report were most favorable to this petitioner, nothing need happen; and the prosecution can continue its holding posture, claiming that the Referee, a Judge, was without constitutional authority, and his report a nullity, requiring

a new reference. For, so hold the State Court of Appeals decisions; *Settle v. Van Evrea*, 49 N. Y. 280, 4; *Countryman v. Norton*, 21 Hun 17, show that, even with the consent of the parties, the acceptance by the local Supreme Court Justice of a reference assignment, will not defeat the absolute prohibition; which can permit of no emasculation, by interpretation, exception, or enlargement by conjecture (*Smith v. Dillon*, 267 App. Div. 39, 43). (Art. 6, Sec. 20 N. Y. State Const.)

Thus, *at both ends* of this disciplinary adventure, an unconstitutional Referee presides, Justices Baker and Hart, voiding the proceedings. Yet the judgment stands "final."

Even the post-judgment order, relied on by the Court of Appeals in the first paragraph of its short opinion, to make the irrevocable final judgment appear non-final is unconstitutional, in prescribing a form of answer, limited to "denials," thus barring affirmative defenses and other forms of available answer.

The State Court of Appeals struck down such limiting rule, when made by the Legislature, delimiting a licensee's right to answer to the state's complaint for revocation, as unconstitutional per se, in *Peck v. Cargill*, 157 N. Y. 391, cited in *re Cullinan*, 82 App. Div. 445.

This prosecution stressed similar restriction, falsely in its brief to the Court of Appeals, even as before Mr. Justice Harlan and this full Court also, thus *burying* a respondent's actual right to file demurrer *before* "denials" (Sec. 404, Jud. Law):

"Of pivotal importance to the issue on this appeal, is appellant's willful and deliberate refusal to interpose an answer denying any of the factual allegations of the Petition. This statement is not an argument. It is a fact."

CONCLUSION.

Petitioner submits that this Court has been blatantly imposed upon, by a prosecution, which resorted to incredible acts, so as successfully to give an initial appearance of the non-existence of any substantial Federal question, upon preliminary application for stay; and then exploited that initial success, spreading its dire effect before the nine Justices, so as to reasonably disarm them of any further interest in the really vital issues of this case, of interest to the entire Bar and the judiciary of the nation. For it may here be added, that at the opening session of a seminar for new Judges being held in New York, addressed by Hon. James B. M. McNally, a member of the Appellate Division, First Department, the New York Times (December 6, 1966) reports as follows:

> "In his remarks yesterday, Justice McNally said that the first thing a new Judge should do is to read the Canons of Judicial Ethics.
>
> "'You'd be surprised at how many judges don't know they exist,' he said. 'Read them and it will keep you out of a great deal of trouble.'"

There can be little or no doubt, that the prosecution succeeded in diverting this Court; which, by its own recorded opinions, would have recoiled before the presence of the very abuses, which the entire Court had determined to prevent, arising in the very secrecy of the inquisition of Kings County.

This Court in *Theard v. U. S.*, 354 U. S. 278, at page 281, registered its sensitivity, still further declaring its

refusal to disbar in the Federal Court, one, who had been disbarred in the State Court, with these words:

> "Disbarment being the very serious business that it is, ample opportunity must be afforded to show cause why an accused should not be disbarred."

This Court is asked to view the actual circuitous futility of a return to the State Courts, without a further direction from this Court (*Mills v. Alabama,* 384 U. S. 214).

If petitioner were now granted certiorari, it may be freely stated that no further labors or submissions of briefs were necessary; it being fairly clear that both sides have fully presented their case, however short the presentations of this respondent have uniformly been in both reviewing courts.

Petitioner prays for vacature of the order, denying certiorari, and for a writ of certiorari, in this unprecedented case.

Respectfully submitted,

WILLIAM ROBERT KLEIN,
Petitioner *pro se.*

Verification.

County and State of New York, ss:

WILLIAM ROBERT KLEIN, being duly sworn, deposes and says that he is the petitioner herein, that he has read the foregoing petition, and that same is true and correct, within petitioner's knowledge.

WILLIAM ROBERT KLEIN

Sworn to before me this
day of December, 1966.
VICTOR BLEIWAS,
Notary Public,
State of New York.
No. 24-5343525 Qual. in Kings Co.
Commission Expires March 30, 1968.

Certificate of Petitioner.

As petitioner *pro se*, I hereby certify that this petition for rehearing is presented in good faith, and not for delay, and is restricted to the grounds specified in Rule 58(2) of this Court.

/s/ WILLIAM ROBERT KLEIN